No. 710.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALASKA UNITED GOLD MINING CO.
Plaintiff in Error,

vs.

HENRY MUSET, as Administrator of the Estate of Edward Hegman, deceased,
Defendant in Error.

Points and Authorities of Plaintiff in Error on Motion to Dismiss and Additional Authorities on Merits of Case.

JOHN FLOURNOY,
Counsel for Plaintiff in Error.

Pernau Bros. Print, 543 Clay St., S. F.

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I.

THE MOTION TO DISMISS SHOULD BE DISMISSED FOR WANT OF SUFFICIENT NOTICE.

The record shows that notice of the motion to dismiss was served on counsel for plaintiff in error on October 18th, 1901. The case came on for hearing on October 22nd, 1901.

Rule 21 of this Court provides that notice of motions shall be served on the adverse party at least five days before the day noticed for the hearing.

We respectfully submit that under Par. 3 of Rule 21, the Court should dismiss the motion for want of sufficient notice.

II.

THE BILL OF EXCEPTIONS WAS PRESENTED FOR ALLOWANCE AND SETTLEMENT WITHIN THE TIME ALLOWED BY THE COURT, AND WAS THEREAFTER PROPERLY ALLOWED AND FILED.

1st. Judgment was rendered on March 16th, 1901. On that day the Judge made the following order: "And " now the said defendant requests forty days in which " to reduce his exceptions to writing and present same " for allowance and settlement by the Court, which said " time is allowed by the Court" (trans. p. 108).

2nd. The bill of exceptions was presented to the Judge on the 15th day of April, 1901, was approved by him on the 7th day of May, 1901, and filed on that day *nunc pro tunc* as of the 15th day of April, 1901 (trans. p. 109).

We contend that under the foregoing facts and the following authorities, the bill of exceptions was properly allowed:

1. *Ward* vs. *Cochran*, 150 U. S. 597:

"A bill of exceptions may be settled and signed

after the judgment term if within the time fixed by order of Court for the purpose."

NOTE. See this case for application of *Muller* vs. *Ehlers*, 91 U. S. 249.

2. *Talbot* vs. *Press Publishing Co.*, 80 Federal, 567 (N. Y. 1897):

"The Circuit Court has power to extend the time for making, filing and serving a bill of exceptions by an order entered *nunc pro tunc* as of a date before the expiration of the time allowed for the purpose, made after the expiration of the term at which the case was tried and judgment entered"
* * *

"Reference is made to *Muller* vs. *Ehlers*, 91 U. S. 249; *Bank* vs. *Eldred*, 143 U. S. 293; *Morse* vs. *Anderson*, 150 U. S. 156; *Ward* vs. *Cochran*, 150 U. S. 597, and it is urged that the Court has no power, after a term has expired, to extend the time for making, etc., bill of exceptions, even within the period allowed by statute for suing out a writ of error. Inasmuch as the exceptions were all taken, noted by the Judge and reduced to writing at the trial, and the bill of exceptions is merely the convenient form in which they are reproduced for the court of review, such a hide-bound practice would often work great injustice. The decision in *Chateaugay Ore & Iron Co.*, 128 U. S. 544, has recognized a more liberal rule as applicable in this district."

3. *In re Chateaugay Ore & Iron Co.*, 128 U. S. 544:

"The fact that the term expired before the exceptions were perfected, is immaterial, as the Federal Circuit Court rules do not limit the time in which exceptions may be prepared to the session of the Court."

NOTE. See this case for application of *Muller* vs. *Ehlers*.

4. *United States* vs. *Breitling*, 20 Howard 252:

> "This Court has repeatedly said that where an exception has been taken at the trial to a ruling of the Court, it may be reduced to writing and signed by the Judge afterwards, and indeed after the term * * *. The Court may suspend its own rule in this as in other cases in aid of justice."

5. *S. P. Co.* vs. *Hamilton*, C. C. A. 9th Circuit, 54 Federal 474:

> "The defendant in error claims that the writ of error in this case should be dismissed 'because no bill of exceptions or statement, as required by the rules of the Circuit Court for the District of Nevada, in support of the motion for a new trial, was ever made or presented to the Judge of said Court within the time required by the rules of practice thereof, or was ever filed in said Court, or settled, until after the motion of the plaintiff in error for new trial was heard and denied'. But the exceptions of the defendant were reduced to form and filed with the clerk at the trial, and before the jury retired, and a formal bill of exceptions filed within the time granted by the Court. It was afterwards settled and approved by the Court as containing a correct statement of the case. Besides, it is within the power of the Court to suspend its own rules, or to except a particular case from them, to subserve the purpose of justice (*U. S.* vs. *Breitling*, 20 Howard 252. See also *Dredge* vs. *Forsyth*, 2 Black 568, and *Kellogg* vs. *Forsyth*, *id.* 573)".

NOTE. In *Bank* vs. *Eldred*, 130 U. S. 693; *Miller* vs. *Morgan*, 67 Federal, 82; *Muller* vs. *Ehlers*, 91 U. S. 249; *U. S.* vs. *Jones*, 149 U. S. 262; the records show

that the bills of exceptions were allowed after the close of the term without authority or any standing rule or the consent of the parties and not within the time allowed by order of Court.

III.

THE FACT THAT THE SUPERSEDEAS BOND WAS DATED APRIL 12TH, 1901, FILED APRIL 17TH, 1901,—HAVING BEEN DULY APPROVED BY THE JUDGE—AND THAT THE WRIT OF ERROR WAS DATED APRIL 15TH, AND FILED APRIL 17TH—HAVING BEEN DULY ALLOWED BY THE JUDGE—IS AN IMMATERIAL IRREGULARITY, AS THE COURT WILL PRESUME THAT IT WAS RE-APPROVED UPON THE ISSUANCE OF THE WRIT.

We respectfully submit the following authority in support of the above proposition:

1. *McClellan* vs. *Pyeatt*, C. C. A. 8th Circuit, 49 Federal 259:

FACTS. Judgment July 8th, 1891; supersedeas bond presented to the Judge July 29th, 1891, and filed July 30th, 1891; August 15th, 1891, writ of error was allowed and the citation duly signed.

HELD. "We are asked to dismiss the writ of error mainly on the following grounds: * * * because the bond antedates the writ of error and is otherwise irregular and defective." * * *

"The objections taken to the bond are not ade-

quate to warrant us in dismissing the writ of error or in vacating the supersedeas. If there are defects in the bond, we have undoubted authority to allow a bond to be given which shall cure such defects. But, in view of the nature of the objections made to the bond, we are of the opinion that it is not necessary to require another bond to be given. It is made payable to the proper parties, it contains the proper statutory conditions under Section 1000 of the Revised Statutes of the United States, and no objection is made to it on the ground that the penalty or the sureties are insufficient to secure the debt, damages and costs, if the plaintiffs in error fail to prosecute their writ to effect. The sole objections to it seem to be that it was taken and approved by the lower Court before a writ of error was sued out, and that it is not signed by both of the plaintiffs in error. Section 1007 evidently contemplates that security shall be taken when the citation issues; and such is the usual and proper practice. It was irregular, therefore, to take, approve, and file a supersedeas bond reciting the allowance of a writ of error before any such writ had in fact been allowed. But it was competent for the Court to re-approve the bond on the issuance of the citation, and such approval may be inferred or presumed, and we think it ought to be conclusively presumed from the subsequent issuance of the citation and allowance of the writ of error."

If the bond is not valid, the defendant in error should ignore it and apply for process to satisfy his judgment. This method would at least tend to demonstrate counsel's faith in his views of the law.

IV.

THE CONTENTION OF DEFENDANT IN ERROR, BASED UPON THE FACT THAT THE WRIT OF ERROR WAS GRANTED AND FILED APRIL 17TH, 1901, AND THE ASSIGNMENTS OF ERROR WERE NOT FILED UNTIL MAY 7TH, 1901, IS, WE THINK, UNDER RULE 11 OF THIS COURT, AND IN VIEW OF THE DECISIONS, SOUND. WE, HOWEVER, RESPECTFULLY CONTEND THAT DEFENDANT IN ERROR IS NOT NOW IN POSITION TO TAKE ADVANTAGE OF THIS VIOLATION OF THE RULE OF THE COURT FOR THE FOLLOWING REASONS:

1. The record (page 31) shows that on the 7th of May, 1901, the plaintiff in error made a motion for leave to withdraw the writ of error and to correct all the proceedings now complained of by defendant in error, and that defendant in error filed written exceptions to and opposed this application.

2. In *Frame* vs. *Portland Gold Mining Co.*, 108 Federal, 750, Circuit Court of Appeals, 8th Circuit (Colorado, April, 1901), the Court used the following language:

> " In the early history of this Court attention was sharply called to this rule, and the announcement was clearly made that it would be enforced, although in the early cases in which its enforcement was invoked we carefully examined the errors assigned in order that no injustice might result from the application of the rule."

The counsel for plaintiff in error were at fault in not

filing assignments of error according to the rule of the Court, but in view of the opposition of the defendant in error to the effort to correct this fault, we do not think that the defendant in error is now in position to invoke a strict enforcement of the rule. He should not be permitted to hold us in the Circuit Court when we wished to correct an error, and then force us out of this Court because the error was not corrected.

As under the circumstances it is not probable that the Court would in any event inflict a severer penalty than a dismissal of the appeal without prejudice, and as under the laws of Alaska plaintiff in error has one year from the 16th day of March, 1901, in which to take its appeal, we respectfully request the Court to extend to plaintiff in error the leniency shown in the earlier cases where a strict enforcement of the rule was invoked, and thus relieve us from the expense and delay of suing out a new writ of error and filing new assignments of error.

ADDITIONAL AUTHORITIES ON MERITS OF CASE.

The plaintiff in error respectfully submits the following additional points and authorities:

1st. THE ONLY NEGLIGENCE CHARGED IN THE COMPLAINT IS THAT OF MR. POPE, THE FOREMAN, IN CUTTING OFF THE AIR, AND THUS STOPPING THE OPERATION OF THE HOIST (trans. 9).

NOTE: There is no charge that the company did not furnish Mr. Hegman a reasonably safe place to work, or that it did not furnish him with suitable tools and appliances with which to work, or that it did not use due care in the selection of fit and competent fellow employees.

2nd. WHEN MR. POPE CUT OFF THE AIR, HE WAS NOT DISCHARGING ANY PERSONAL AND POSITIVE DUTY OWED BY THE COMPANY TO MR. HEGMAN WHICH HAD BEEN DELEGATED TO HIM, AND WAS, NOTWITHSTANDING HE HAD THE RANK OF FOREMAN, A FELLOW SERVANT WITH MR. HEGMAN.

It is conceded that a master owes his servant the following personal and positive duties: To furnish him a reasonably safe place to work, and with suitable tools and appliances with which to work, and to use due care in the selection of fit and competent fellow employees.

It is also conceded that a master may delegate these duties to another, and that such delegation does not in any manner affect the responsibility of the master for

their proper performance.

It is claimed, however, that the servant to whom the performance of these duties has been delegated is the vice principal of the master only while discharging such duties and that he is a fellow servant with other servants in respect to all other acts which he may perform.

The vice principal may not be a superior servant in the sense in which that term is used in the law of fellow servants. The status of a servant as a vice principal does not depend upon his rank or the grade of his employment, but wholly upon the character of the duties which he performs.

A servant in the performance of one of the master's personal duties is a vice principal, regardless of whether he occupies a position superior or inferior to that of other servants.

The negligence of a servant, who may be a vice principal while in the discharge of the personal duties of a master, will not charge the master with liability to a fellow servant when such negligence occurs in the discharge of the ordinary duties of such servant.

We refer, in addition to the cases cited in the opening brief, to the following authorities in support of the foregoing contention:

1. *New England R. R. Co.* vs. *Conroy*, 175 U. S. 323:

The Court here reviews many cases on the subject of who are fellow servants, and especially *Baltimore & O. R. Co.* vs. *Baugh*, 149 U. S. 368, and *Chicago, M. & St. R. R. Co.* vs. *Ross*, 112 U. S. 377.

I call the special attention of the Court to the following portion of that decision:

> "In so far as the decision in the case of Ross is to be understood as laying it down, as a rule of law to govern in the trial of actions against railroad companies, that the conductor, merely from his position as such, is a vice principal, whose negligence is that of the company, it must be deemed to have been overruled, in effect if not in terms, in the subsequent case of *Baltimore & O. R. Co.* vs. *Baugh*, before cited. There Mr. Justice Brewer, in commenting upon the proposition applied in the *Ross case*, that the conductor of a train has the control and management of a distinct department said:
>
> " 'But the danger from the negligence of one specially in charge of the particular work is as obvious and as great as that of those who are simply co-workers with him in it, each is equally with the other an ordinary risk of the employment. If he is paid for the one, he is paid for the other; if he assumes the one, he assumes the other. Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and, thus assumed by the employee, it includes all co-workers to the same end, whether in control or not. But if the fact that the risk is or is not obvious does not control, what test or rule is there which determines? Rightfully this, there must be some personal wrong on the part of the master, some breach of positive duty on his

part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible.'"
* * *

2. *Stevens* vs. *Chamberlin*, 100 Federal 378, C. C. A. 1st Circuit, 1900:

"It should be observed that since the case was tried by the jury the Supreme Court has decided *Railroad Co.* vs. *Conroy*, 175 U. S. 323, in a manner which clears up some questions which were before doubtful. There may, of course, be instances where the question whether or not different individuals are co-employees for the purpose of the issue in this case should be submitted to the jury for their determination on proper instructions from the Court; but, on facts which are so far from dispute as those in the record at bar, the practice of the Supreme Court has been to dispose itself of that question, or to direct the Circuit Court to dispose of it, as a question of law, or as one not contestible on the proofs in the case. This was emphatically so in *Railroad Co.* vs. *Conroy*, *ubi supra*. The only other cases relating to this point to which we need refer are *Railroad Co.* vs. *Keegan*, 160 U. S. 259; *Railroad Co.* vs. *Peterson*, 162 U. S. 346; *Martin* vs. *Railroad Co.* 166 U. S. 399; *Mining Co.* vs. *Whelan*, 168 U. S. 86."

After referring to *Alaska Treadwell Gold Mining Co.* vs. *Whelan*, 168 U. S. 86, the Court continues:

"As to the main question in this case, it is useless to burden an opinion with citations from the state courts, where the views have been so conflicting, and the expressions of them almost innumerable; also, where so much has been said on

this topic in the various opinions of the several Justices of the Supreme Court, speaking in behalf of that Court, it would not be prudent to accept any particular expression as settling the law beyond what the case itself demanded. Nevertheless, it may well be maintained that the alleged rule of vice principal, so far as it concerns the relations of different persons employed by the same principal to accomplish a common result, has no proper recognition by the Supreme Court with reference to the issue in this case, as we have pointed it out. On the question of who are co-servants, it was said by Justice Brewer in *Railroad Co.* vs. *Baugh*, 149 U. S. 368, 387, as follows:

> " 'If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor.' " * * *

NOTE: We submit that the facts in the case at bar are so far from dispute that under the authority of this case it was clearly error for the Court to refuse to instruct the jury to find a verdict for the defendant.

3. *Louisville & N. R. Co.* vs. *Stuber*, 108 Federal 934 C. C. A. 1st Circuit, 1901:

> "The general rule is that a master is not liable for an injury sustained by one servant through the negligence of another in the same general service, in the absence of negligence of the master in respect to those duties which he is universally regarded as having assumed toward his servants, such as the obligation to exercise care in the selection of those to be associated with him, or of a place to carry on his work, and proper tools or

materials with which he is to do it; and there is no sanction in the controlling authorities for taking a case out of the general rule of nonliability for the negligent acts of another servant by refined distinctions as to who are fellow servants, based upon the subordination of one servant to another or upon the circumstances that two servants are engaged in different departments of a common service."

4. *McDonald* vs. *Buckley*, 109 Federal 290, C. C. A. 5th Circuit, 1901:

"A general foreman, employed by contractors, and having charge of the work of putting in the foundations for a wharf, and of all employes engaged in the work, with power to employ and discharge, while engaged in the actual work of directing the operations of a pile driver, giving the signals to the engineer for the fall of the hammer, is a fellow servant with the other members of the pile-driver gang; and any negligence committed by him while thus working, resulting in injury to another workman, is his own personal negligence, for which the master is not responsible, where there was no negligence of the master in his selection."

5th. *Lochbaum* vs. *Oregon Ry. & Nav. Co.*, 104 Federal 852, C. C. A. 9th Circuit, 1900:

"A section foreman on a railroad, who is under a division road master having authority to direct the work and inspect the same, and who is required to report to a general road master, who in turn reports to the general superintendent, is a fellow servant with the men working under him, whether or not he has authority to hire and discharge them; and the company is not liable for any injury to one of the men resulting from his negligence."

NOTE: The Court in the above case cites as authority

Mining Co. vs. *Whelan*, 168 U. S. 68.

The material inquiry in cases of this character is as to the nature of the act causing the injury and not as to whether the negligent servant was the superior of the injured servant, or as to the degree in rank of the negligent servant above the injured servant.

We contend that, tested by this rule, which has been established by recent decisions of the Supreme Court and applied in the decisions of the Circuit Courts of Appeals in the First, Fifth and Ninth Circuits, Mr. Pope was, when he cut off the air, a fellow servant of Mr. Hegman; that he was not then in the discharge of any positive duty which the company owed to Mr. Hegman, and that the company cannot be held liable for the injury.

We respectfully submit that the Court erred in refusing to instruct the jury to render a verdict for defendant and that the judgment should be reversed and a new trial granted.

JOHN FLOURNOY,
Counsel for Plaintiff in Error.